STATEMENT
OF
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CHAIRMAN
COMMITTEE ON INDIAN AFFAIRS
FOR THE
JULY 25, 2001
OVERSIGHT HEARING
ON THE
INDIAN GAMING REGULATORY ACT

The Committee meets this morning to receive testimony on the implementation of the Indian Gaming Regulatory Act.

This is the first in a series of hearings that the committee has planned to explore matters related to gaming. Our next hearing will focus on how other forms of gaming are regulated in the various States.

But today's hearing is on the Indian Gaming Regulatory Act, and as the primary sponsor of the act in the Senate, I think it is important that, as we consider the information we will receive today, we have some context in which to place it.

Fourteen years ago, the United States Supreme Court handed down its ruling in the case known as California v. Cabazon Band of Mission Indians.

As we all now know, the court found that notwithstanding the delegation of authority to various States, including the State of California, to exercise jurisdiction over certain enumerated crimes on Indian lands, because the State of California did not criminally prohibit gaming, the state could not enforce its gaming laws on Indian lands.

Thereafter, I think it is fair to say that considerable pressure was brought to bear on the Congress to address the Supreme Court's ruling. And so we began the process of developing legislation in consultation with the Tribal governments, the States, and representatives of the administration. We developed draft legislation and held hearings to receive testimony on that legislation.

Because some of you may not know what was going on back then, you may be interested to know that the administration was adamantly opposed to any federal presence in the regulation of Indian gaming; and that this opposition was based in part on the perception that except for those States in which all gaming was criminally prohibited, namely the States of Utah and Hawaii, most if not all of the States had extensive regulatory systems in place that had the capacity to assume the responsibility for the regulation of Indian gaming.

We knew that for the most part, Tribal governments did not, at that time, have comprehensive regulatory systems in place, and so one of the most basic features of the act – the Tribal-State compact – was premised upon the anticipation that States and Tribes could enter into negotiations which would

include discussions of how tribal gaming could be regulated.

It was anticipated that at least initially, the States would share their experience with regulating gaming with the Tribes, and that the Tribal governments could draw upon the State's regulatory framework in developing a Tribal regulatory structure. It was thought that the Tribal-State compact might reflect a transition, over a period of time, from regulation that was predominantly State regulation to either a shared regulatory structure, or to Tribal regulation exclusively. The act left it up to each State and each Tribe to decide.

But as it turns out, that presumption – the presumption that most if not all of the States had extensive regulatory systems for gaming similar to those that existed in Nevada and New Jersey – was not borne out in fact.

And because we had a two-hundred-year-old history under our constitution which clearly established that State laws did not apply in Indian country, it was understandable that Tribes were adamantly opposed to State regulation of gaming.

But we had the administration on the other side – an administration that was dedicated to the protection of States' rights – and they were equally as adamantly opposed, to any federal regulation of gaming.

As with most legislation, we ended up striking a balance, and so we established the National Indian Gaming Commission to serve, along with Tribes, as the regulators of tribal gaming.

At that time, we simply couldn't project and did not anticipate the growth in the gaming industry generally, and the significant expansion of Indian gaming in particular. And so the Commission's responsibilities were tailored to what we knew then, and at that time, we didn't even know whether there would be enough Indian gaming operations nationwide to warrant having three full-time commissioners at the commission. We also didn't know how technology might overtake the definitions of class II and class III gaming that are contained in the act.

We thought tribal gaming operations on different reservations might be linked up via satellite but that as long as the player was on indian lands and that the bingo was conducted on indian lands, then the regulatory framework of the act could take this into account and be consistently applied.

Perhaps the most challenging issue was what law would be applied to determine what we now call "the scope of gaming". There was little federal law on the subject. There was the Johnson Act, prohibiting gambling devices on federal lands, and therefore Indian lands. But there was no federal law that was as specific as the laws of Nevada or New Jersey, and once again, the administration was opposed to having such federal law enacted.

Tribal laws on gaming were sparse, at best, and with rare exception, did not address what we think of as casino-type gaming. All that was left were the laws of the States, and again, a presumption was made that all of the States had laws on gaming. As it turns out, that was another erroneous assumption.

Because as years passed, and litigation ensued over the scope of gaming, and the Congress was pressed to amend the act, this Committee's analysis of the laws of the fifty States found wide variation in those laws, where such laws existed.

In some States, there was just a general prohibition against gaming, and over time, certain exceptions were carved out of that prohibition, such as the conduct of gaming for charitable purposes. That was typical of many States' laws. Or, in more recent times, exceptions from general prohibitions on gaming in State laws were made for State lotteries.

But in each State, the laws differed, so the generic approach that we took in the Indian Gaming Act – authorizing States and Tribes to negotiate over class III gaming activities that are "located in a State that permits such gaming for any purpose by any person, organization or entity" seemed the most fair way to assure that Tribal governments were not foreclosed from doing what others in a State were permitted to do.

Eleventh amendment law was not well-developed in 1988, so Justice Department attorneys tell us now that they could not have advised the Committees of Congress that the remedy that the act set up for addressing an impasse in negotiations between a Tribe and a State, might later be found to be unconstitutional.

Having recounted this history, one might well ask how this act has worked at all – given all that we did not know then, and all that we do know now. And that is what we are here today to examine.

How is the Indian Gaming Regulatory Act working?

How many Tribal governments have opted to conduct gaming on their lands, and perhaps more importantly, how many have really benefitted from gaming?

Some have done very well, this is true. But how many tribal gaming operations have failed, or are only marginally profitable?

Are there disincentives in the act or obstacles to successful development in the act that have caused some tribal gaming operations to fail?

Given what we now know about the expansion of the tribal gaming industry – is this little Commission that the law established adequate to address the growth in the industry?

With the advent of lotteries and riverboat gaming and such, have States subsequently developed more comprehensive regulatory structures and do these State systems serve the Tribes well? Or not at all? Or somewhere in between?

Is, as has been asserted in the past, tribal gaming overly regulated?

Are there adequate protections in place to assure that those who may be injured on tribal lands have legal recourse for their injuries?

These are some of the difficult and often contentious issues that this Committee's ongoing oversight of the act has raised.

What we do know is that the Indian Gaming Regulatory Act has given rise to the development of good working relationships between State governments and Tribal governments – relationships that in many cases did not exist prior to the enactment of the Indian Gaming Act.

Across the country, Tribal governments and State governments have learned to work together to address mutually-shared problems, and where tribal gaming has been successful, State and local economies have thrived also. Let there be no mistake about that.

Whether or not the Congress decides to revisit this act to bring it up to date with the contemporary realities of gaming, I do hope that we have established a model that will portend the future of Tribal-State relations. Because overall, that model has worked well, and has shown that governments can help one another in important and significant ways.